Aseam Credit Sdn Bhd v Eminent Avenue Sdn Bhd

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-02–939 OF 2002
SURIYADI, ABDULL HAMID EMBONG AND VINCENT NG JJCA
1 NOVEMBER 2007

Land Law — Sale of land — Order for — Application for order — 'Cause to the contrary' — Whether existed cause to the contrary — National Land Code ss 256 & 257

Land Law — Sale of land — Order for — Application for order — 'Cause to the contrary' — Whether existed cause to the contrary — Whether plaintiff ought to comply strictly with provisions of Moneylenders Act 1951 — Whether plaintiff lawfully exempted from compliance with provisions of Moneylenders Act by Ministry for relevant period

The appellant is a financial institution governed by the Moneylenders Act 1951. The respondent created a third party charge in favour of the appellant to secure a loan from the appellant to one Tow Kong Liang. The borrower defaulted in the repayment of his loan. The appellant applied for an order for sale of the respondent's property pursuant to the said charge. The High Court dismissed the application with costs. The appellant appealed to the Court of Appeal.

Held, dismissing the appeal:

(1) Whichever way one looks at it, either the initial offer by the appellant to the respondent or the charge, it was obvious that the charge was a consideration for the extension of the loan of 1995 to 48 months. It was additional security for the balance of the loan, which at that material time amounted to RM4,336,686.34. There was no indication at all that the charge was in respect of any credit leasing or share financing transaction. The facts showed that it was not just a case of a person or entity lending money in a 'friendly' manner, but a contract subjected to the demanding provisions of the Moneylenders Act 1951 (if not for the alleged statutory exemption). On that premise, if the appellant were not to comply with any of the provisions strictly, it would have acted in a manner contrary to a written law, and would tantamount to a cause to

the contrary. Such non-compliance, if it did occur, would be ample reason to dismiss the foreclosure proceedings (see paras 8–9).

(2) Even though there was no mistaking that the appellant had not complied strictly with the Moneylenders Act 1951, the appellant had justified that non-compliance on the premise of an alleged exemption given by the Government earlier. If the evidence were to show that the appellant was a recognized moneylender that was lawfully exempted by the Ministry for that relevant period, then its shortcomings could be salvaged, but only for that particular period (see para 12).

(3) It must be understood that this was an exemption founded on a statute, and no other evidence could speak out louder than the relevant gazette. Its non-production was not a mere irregularity that could be overlooked and waived especially when it was challenged by the respondent. Without such proof the court was unwilling to accept the submission that an exemption had been granted by the Ministry. Even if there was a valid exemption order for that three-year period, of which was disputed vehemently by the respondent, it did not cover the transaction in this appeal (see paras 16 & 19).

(4) The appellant had not sufficiently established that it was an exempted entity at the relevant time, coupled with the obvious evidence that it had breached a large number of provisions in the Moneylenders Act 1951, 'cause to the contrary' had been established within the meaning of s 256(3) of the National Land Code (see para 21).

[Bahasa Malaysia summary

Perayu merupakan institusi kewangan yang dikawal oleh Akta Pemberipinjam Wang 1951. Responden telah membentuk satu gadaian pihak ketiga bagi pihak perayu untuk memperoleh pinjaman daripada perayu kepada Tow Kong Liang. Peminjam telah gagal membuat bayaran balik pinjamannya. Perayu telah memohon untuk satu perintah jualan hartanah responden menurut gadaian tersebut. Mahkamah Tinggi telah menolak permohonan itu dengan kos. Perayu telah merayu ke Mahkamah Rayuan.

Diputuskan, menolak rayuan tersebut:

(1) Dari segi manapun ia dilihat, sama ada tawaran asal oleh perayu kepada responden atau gadaian tersebut, ia jelas bahawa gadaian tersebut adalah balasan untuk lanjutan pinjaman 1995 kepada 48 bulan. Ia adalah jaminan tambahan untuk baki pinjaman, yang mana pada masa matan berjumlah RM4,336,686.34. Tiada tanda langsung gadaian tersebut berkaitan apa-apa pajakan kredit atau transaksi

pembiayaan saham. Fakta menunjukkan bahawa ia bukan sahaja satu kes mengenai seseorang atau entiti memberi pinjaman wang secara 'friendly', tetapi satu kontrak tang tertakluk kepada peruntukan Akta Pemberipinjaman 1951 (jika bukan untuk pengataan pengecualian statutori). Atas premis tersebut, jika perayu tidak mematuhi mana-mana peruntukan secara ketat, ia bertindak dengan cara bertentangan undang-undang bertulis, dan sama seperti kausa bertentangan. Ketidakpatuhan sebegini, jika berlaku, memberi alasan yang lebih daripada cukup untuk menolak prosiding halang tebus (lihat perenggan 8–9).

(2) Meskipun tidak silap lagi yang perayu tidak mematuhi Akta Pemberipinjaman 1951 tersebut, perayu telah menjustifikasikan yang ketidakpatuhan atas premis pengecualian yang dikatakan telah diberikan oleh Kerajaan sebelum itu. Jikapun keterangan menunjukkan bahawa perayu pemberipinjam wang yang dikenali yang secara sah telah diberikan pengecualian oleh Kementerian untuk tempoh berkaitan, kelemahannya dapat diselamatkan, tetapi hanya untuk tempoh tersebut (lihat perenggan 12).

(3) Harus difahami bahawa pengecualian ini adalah berasaskan suatu statut, dan tiada keterangan lain dapat menyatakannya selain warta yang berkaitan. Ketiadaan penghasilannya bukan semata-mata satu luar aturan yang boleh tidak diendahkan dan diketepikan terutamanya jika ia dicabar oleh responden. Tanpa bukti sebegini mahkamah enggan menerima hujah bahawa satu pengecualian telah diberikan oleh Kementerian. Jikapun terdapat satu perintah pengecualian sah untuk tempoh tiga tahun tersebut, yang telah dipertikaikan bersungguh-sungguh oleh responden, ia tidak meliputi transaksi dalam rayuan ini (lihat perenggan 16 & 19).

(4) Perayu tidak membuktikan dengan sewajarnya bahawa ia merupakan satu entiti yang telah dikecualikan pada masa berkaitan, tambahan pula dengan keterangan nyata bahawa ia telah melanggar kebanyakan daripada peruntukan dalam Akta Pemberipinjaman 1951, ' cause to the contrary' telah dibuktikan dalam maksud s 256(3) Kanun Tanah Negara (lihat perenggan 21).]

Notes

For cases on order for sale of land, see 8(2) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 4131–4234.

Cases referred to

Arjan Singh Son of Inder Singh v Hashim Angullia & Ors [1941] MLJ 55 (refd)
Chee Pok Choy & Ors v Scotch Leasing Sdn Bhd [2001] 4 MLJ 346 (refd)

James Edward Buxton & Anor v Supreme Finance (M) Berhad [1992] 4 CLJ 1945 (refd)
Kandiah Peter v Public Bank Berhad [1994] 1 MLJ 119 (refd)
Kartar Singh v Mahinder Singh [1959] MLJ 248 (refd)
Kok Swee Chin v General Factoring & Credit Sdn Bhd [2004] 6 MLJ 276 (refd)
Low Lee Lian v Ban Hin Lee Bank [1997] 1 MLJ 177 (refd)
Murugappa Chettiar v Letchumanan Chettiar [1939] MLJ 296 (refd)
Perwira Habib Bank Malaysia Bhd v Viswanathan s/o Ramakrishnan [1996] 2 CLJ 505 (refd)
Subchent Kaur v Chai Sau Kian [1958] MLJ 32 (refd)
Teja Singh v Rattan Singh [1961] MLJ 39 (refd)

Legislation referred to
Evidence Act 1950 s 114(e)
Moneylenders Act 1951 ss 2A(2), 17, 21, 22, 23
National Land Code s 256(3), Form 16D

Appeal from: Originating Summons Nos S1(S7) (S2)-24–2741 of 2000 (High Court, Kuala Lumpur)

Asbir Kaur Sangha (Anit Kaur with her) (Asbir Hira Singh & Co) for the appellant.
Dato S Murthi (C Leo & Camoens) for the respondent.

Suriyadi JCA (delivering judgment of the court):

[1] This appeal arose from the dismissal with costs on 5 November 2002 by the learned High Court judge of the appellant's application, for an order for sale in respect of land held under HS(D) 83488, number PT 43, Mukim Kuala Lumpur, Wilayah Persekutuan which the respondent had charged to the appellant. The appellant is a financial institution governed by the Moneylenders Act 1951 and the respondent a third party chargor. The respondent had created a third party first legal charge dated 20 April 1998 registered in favour of the appellant vide charge presentation No 4823/98 to secure a loan of RM7.5m from the appellant to one, Tow Kong Liang ('the borrower') and granted vide memorandum of loan agreement dated 27 February 1995. It was admitted and agreed upon by all the parties that the purpose of the loan of RM 7.5 million, granted to the borrower, was for share financing.

[2] In the midst of the loan agreement period, the appellant alleged that an exemption was granted by the Housing and Local Government Ministry under s 2A(2) of the Act, for the period from 29 August 1997 until 28 August 2001 ('the exemption period') of all the provisions of the Moneylenders Act

1951. As it were, the borrower defaulted in the repayment of his loan and the appellant's solicitors sent letters of demand to the borrower dated 18 June 1998 and 1 July 1998. As the borrower failed to remedy the breach, the appellant through its solicitors sent a letter of demand dated 4 February 1999 to the respondent and subsequently issued a notice under Form 16D of the National Land Code dated 12 June 2000, seeking repayment of the sum secured under the charge. With the respondent's failure to remedy the breach, the appellant filed an application for an order for sale on 4 October 2000. That application was supported by an affidavit affirmed by one Lim Cheng Chooi on 11 October 2000. Before the High Court judge, as said above, the application was dismissed with costs.

[3] Even though this appeal was a rehearing, we certainly were not unmindful of the reasons supplied by the learned High Court judge when dismissing the appeal. Indisputably the charge was an independent security document, and the rights of the appellant in the normal course of event would be protected, as contracted to by the parties hereto as provided for by the relevant agreement. If it were enforced it would merely be enforcing its statutory rights founded on that registered charge and would not face the hassle of having to sue for a debt. In the case of *Kandiah Peter v Public Bank Berhad* [1994] 1 MLJ 119 the Supreme Court on p 122 had held:

> He merely enforces his rights as a chargee by exercising his statutory remedy against the chargor in default. The chargee, therefore, does not sue for a debt. It is also clear that his claim for an order for sale is not based upon a covenant but under the registered charge. The order for sale when made under s 256 of the Code is not a judgment or a decree. The court hearing the application for foreclosure does not make, and in any event ought not to make, any adjudication upon any substantive issue

[4] In *James Edward Buxton & Anor v Supreme Finance (M) Berhad* [1992] 4 CLJ 1945 the Supreme Court had held at p 1949:

> In all these cases, it was held that the interest of a registered charge is indefeasible by s 340(1) of the Code unless it is made defeasible by s 340(2).... The interest of a bona fide purchaser for value cannot prevail over that of a registered chargee

[5] By further analogy, in the case of *Perwira Habib Bank Malaysia Bhd v Viswanathan s/o Ramakrishnan* [1996] 2 CLJ 505, it was held at p 506:

> A decision on whether or not to allow the plaintiff's application for an order for sale could not be grounded on agency law alone, but on the broader investigation under s 256(3) of the NLC. Agency law could not be applied directly to deny the plaintiff of his right which was contracted, under the statutory provisions of the

NLC. The plaintiff, being a registered charge, acquired an indefeasible interest in the land under s 340(1) of the NIC and could enforce the charge under s 253(1) of the NLC. (Emphasis added.)

[6] It was clear at the very outset that this was a case of a guarantor who had charged his property on behalf of a borrower, with the charge being a form of security for the balance of the loan granted way back in 1995. To answer any query why we found that the charge was merely for additional security of the balance of the original loan, a need arises therefore to see the charge ie LCC3, which is dated 20 April 1998 (RR 214). It reads:

Kami, Eminent Avenue Sdn Bhd (351142-W), sebuah syarikat yang ditubuhkan di Malaysia di bawah Akta Syarikat 1965 dan mempunyai pejabat kami yang berdaftar di Level 12, Menara AA, 247, Jalan Tun Razak, 50400 Kuala Lumpur... tuanpunya tanah... yang tersebut dalam jadual di bawah ini bagi tanah yang tersebut itu; Bagi maksud menjamin:

(a) ...

(b) pembayaran wang sebanyak RM4,336,686.34, kepada pemegang gadaian yang tersebut nama dibawah ini, beserta faedah, dan sebagai balasan- Bagi semua pendahuluan didalam ini atau yang kemudian daripada ini dibuat kepada TOW KONG LIANG [No KP 510513-07-5439(3781801)] atas permintaan kami…

[7] Apart from the above we refer also to the letter dated 27 February 1998 from the appellant to the borrower at p 211 of the Rekod Rayuan which reads:

MR TOW KONG LIANG (I/C NO: 3781801) c/o Austral Amalgamated Berhad
Level 12, Menara AA 247, Jalan Tun Razak 50400 Kuala Lumpur
Attn: Mr Arul/Ms L.K Chow

Dear Sir,

RE: MEMORANDUM OF LOAN AGREEMENT DATED 27TH FEBRUARY 1995

We refer to the Loan made available by a Memorandum of Loan Agreement dated 27th February 1995 ('the Memorandum of Loan Agreement') between ourselves as the Lender and yourself as the Borrower. Terms defined in the Memorandum of Loan Agreement have the same meanings herein.

Upon your request, we hereby agree to extend the maturity date of the Loan as stated in Section 3.03 of the Memorandum of Loan Agreement from twelve (12) months to forty-eight (48) months... All the terms and conditions of the Loan for the extension period shall be the same as per the Memorandum of Loan Agreement, save and except as stated below:

(1) ...

(2) ...

(3) ...

(4) ...

(5) Additional Security

Third party first legal charge on a piece of land held under PT 43, HS (D) 83488, Mukim of Kuala Lumpur, District of Wilayah Persekutuan.

...

Yours faithfully

ASEAM CREDIT SDN BHD

(signature)

TERRY LIM

I, hereby accept the renewal of the Term Loan Facility on the above terms and conditions:-

(SIGNATURE).

...

MR TOW KONG LIANG

[8] Whichever way one looks at it, either the initial offer by the appellant to the respondent or the charge, it was obvious that the charge was a consideration for the extension of the loan of 1995 to 48 months. It was additional security for the balance of the loan, which at that material time amounted to RM4, 336,686.34. There was no indication at all that the charge was in respect of any credit leasing or share financing transaction.

[9] The facts showed that it was not just a case of a person or entity lending money in a 'friendly' manner, but a contract subjected to the demanding provisions of the Moneylenders Act 1951 (if not for the alleged statutory exemption). On that premise, if the appellant were not to comply with any of the provisions strictly, it would have acted in a manner contrary to a written law, and would tantamount to a cause to the contrary. Such non-compliance, if it did occur, would be ample reason to dismiss the foreclosure proceedings.

[10] In the case of *Low Lee Lian v Ban Hin Lee Bank* [1997] 1 MLJ 177 the Federal Court had occasion to enunciate, and enumerate that a chargor may show cause to the contrary under s 256(3) of the National Land Code by demonstrating:

(i) that the charge is defeasible upon one or more of the grounds specified under sub-ss (2) and (4)(b) of the said s 256;

(ii) that the charge has failed to meet the conditions precedent for the making of an application for an order of sale, such as failure to make a demand or service of a notice in Form 16D, or that the notice demands sums not lawfully due from the charge; and

(iii) that its grant would be contrary to some rule of law or equity.

[11] The above case had adverted to the case of *Murugappa Chettiar v Letchumanan Chettiar* [1939] MLJ 296 before enunciating the third consideration, whereat in the latter case the court had remarked:

> a chargor may 'shew cause' either in law or equity against an application for an order for sale, and that the court should refuse to make an order in every case where it would be unjust to do so. By 'unjust' I mean contrary to those *rules of the common law* and equity …
>
> (Emphasis added.)

[12] Even though there was no mistaking that the appellant had not complied strictly with the Moneylenders Act 1951, the appellant had justified that non-compliance on the premise of an alleged exemption given by the Government earlier. If the evidence were to show that the appellant was a recognized moneylender that was lawfully exempted by the Ministry for that relevant period, then its shortcomings could be salvaged, but only for that particular period (*Kok Swee Chin v General Factoring & Credit Sdn Bhd* [2004] 6 MLJ 276). Admittedly the success of the appellant's case depended solely on this argument. That being so it became encumbent upon us to scrutinize this argument thoroughly, and some of the questions we posed were as follows:

(i) was there an exemption at all granted by the relevant Ministry at the time when the borrower had defaulted on the loan;

(ii) where was the proof of that exemption;

(iii) was it gazette; and

(iv) if no proof of the exemption was forthcoming what then was the effect on the foreclosure proceeding?

[13] To have a better understanding of the problems before us it is quite necessary to regurgitate some of the salient facts:

(i) Date of loan agreement…….27 February 1995;

(ii) Charge executed on……..……..20 April 1998;

(iii) Demand letter to borrower…18 June 1998 and 1 July 1998;

(iv) Demand letter to respondent…….. 4 February 1999;

(v) Appellant issued Form 16 D notice……..…12 June 2000;

(vi) Application for foreclosure filed on…….. 4 October 2000;

(vii)Exemption period…..from 29 August 1997 until 28 August 2000;

(viii) Supposed extention…….until 28 August 2001.

[14] Perusing the above skeletal facts, it was obvious that both the charge and the default in payment committed by the borrower, occurred smack in the middle of the alleged exemption period. Due to the timing and the significance of that exemption order the court's first poser to the appellant was to request for proof of it. In response, the appellant had referred to a letter dated 4 July 2000 which reads:

Pengarah,

ASEAM CREDIT SDN BHD,

38th Floor, Menara Maybank,

Box No. 90, Jalan Tun PeraK,

50050 KUALA LUMPUR.

Tuan

PERMOHONAN PENGECUALIAN DI BAWAH SEKSYEN 2A(2) AKTA PEMBERI PINJAM WANG 1951

Adalah saya diarah dengan hormatnya merujuk kepada surat tuan bertarikh Mei 2000 berhubung perkara tersebut di atas dan dimaklumkan bahawa Y.B. Menteri Perumahan dan Kerajaan Tempatan pada menjalankan kuasa yang diberikan oleh seksyen 2A(2) Akta Pemberipinjam Wang 1951, bersetuju memberi pengecualian kepada Aseam Credit Sdn. Bhd. bagi menjalankan aktiviti-aktiviti pemajakan kredit dan pembiayaan syer untuk tempoh satu tahun mulai 29 Ogos 2000 sehingga 28 Ogos 2001 dengan syarat-syarat berikut

…….

Kementerian ini akan mengambil tindakan untuk mewartakan pengecualian ini dalam Warta Kerajaan secepat mungkin dan pengecualian ini boleh ditarik balik pada bila-bila masa sahaja sekiranya tidak mematuhi syarat-syarat yang dikenakan.

BERKHIDMAT UNTUK NEGARA

Saya yang menurut perintah,

(MOHD. HASHIM BIN SALEH)

Bahagian Pelesenan dan Khidmat Nasihat,

b/p Pendaftar

[15] In brief, the above letter was a letter from the Ministry of Housing and Local Government informing the appellant that the Ministry had agreed to

exempt it pursuant to s 2A(2) of the Moneylenders Act 1951, pertaining to credit leasing and share financing activities, for the period beginning from 29 August 2000 until 28 August 2001 subject to certain conditions. The Ministry also had agreed that it would take the necessary action to gazette the exemption as quickly as possible. The exemption could be withdrawn if the appellant did not comply with the conditions.

[16] We were not impressed with this letter as we wanted gazettes, which exempted the appellant for the period of 29 August 2000, until 28 August 2001 and not a letter that promised future actions. It must be understood that this was an exemption founded on a statute, and no other evidence could speak out louder than the relevant gazette. Its non-production was not a mere irregularity that could be overlooked and waived especially when it was challenged by the respondent (*Chee Pok Choy & Ors v Scotch Leasing Sdn Bhd* [2001] 4 MLJ 346). Without such proof we were unwilling to accept the submission that an exemption had been granted by the Ministry.

[17] The appellant did attempt to allude to s 114(e) of the Evidence Act 1950 in that a court may presume that judicial and official acts have been regularly performed. Gauging this presumption provision, it clearly speaks out of what has been performed rather than what shall be done before such presumption is triggered. The inference here that the Ministry had regularly performed its promise ie of gazetting the exemption was rebuttable as there was not an iota of evidence that could establish that fact. In fact the reverse was more likely. How could the appellant deny that:

(a) it was merely a letter to inform the respondent that the exemption application had been approved;

(b) the approval was subject to conditions;

(c) there was no evidence to establish that these conditions had been complied with;

(d) admittedly there was a promise by the Ministry to gazette;

(e) a promise to perform cannot be equated with having performed as required by s 114(e) of the Evidence Act 1950; and

(f) the exemption could be withdrawn if the appellant did not comply with the conditions.

[18] Founded on the above reasons we were therefore naturally quite dissatisfied with the mere assertion by the appellant of the gazette's existence. Further there was no evidence to establish compliance of all the conditions. Additional to that even if the exemption had been gazetted, we were not satisfied that the exemption covered the purpose of the impugned charge.

Evidentially it was obvious that the charge was not connected to any credit leasing and share financing activities but as additional security for a previous loan (LCC3 and the letter of 27 February 1998 at RR 211). Most adverse to the appellant is the fact that the exemption was not retrospective but current and prospective.

[19] As regards the exemption of PU(B) 489, which were also not exhibited, and only the letter to go by as regards the contents of the gazette, the same argument applied likewise with equal force for the period from 29 August 1997 to 28 September 2000. We were satisfied that even if there was a valid exemption order for that three-year period, of which was disputed vehemently by the respondent, it did not cover the transaction in this appeal.

[20] With these findings, the back of the appellant's argument had been broken. It was now shorn off of any protection, and left standing as a mere moneylender, subject to the full force of the provisions of the Moneylenders Act 1951. We were in total agreement with the appeal judge's factual finding that:

(1) the appellant had not given a copy of the note or memorandum of the moneylender's contract to the borrower, hence contravening s 16 of the Act;

(2) the appellant had imposed compound interest in the agreement contrary to s 17 of the Act;

(3) no accounts were tendered in court by the appellant when commencing this action thus contravening s 21 of the Act;

(4) the appellant had imposed an interest at the rate of 16% contrary to s 22 of the Act; and

(5) by imposing costs, charges and other expenses the appellant had contravened s 23 of the Act.

[21] There is no shortage of authority, both English and local, that states that the provisions of the Moneylenders Act 1951 must be strictly complied with, the detraction of which will not get the sympathy of any court (*Kartar Singh v Mahinder Singh* [1959] MLJ 248; *Subchent Kaur v Chai Sau Kian* [1958] MLJ 32; *Teja Singh v Rattan Singh* [1961] MLJ 39; *Arjan Singh Son of Inder Singh v Hashim Angullia & Ors* [1941] MLJ 55). Founded on those findings of facts, that the appellant had not sufficiently established that it was an exempted entity at the relevant time, coupled with the obvious evidence that it had breached a large number of provisions in the Moneylenders Act 1951, we were satisfied that 'cause to the contrary' had been established within the meaning of s 256(3) of the National Land Code. We thus unanimously had no reservation in dismissing this appeal with costs.

We thereupon ordered that the order of the High Court be reaffirmed and the deposit of the appellant be paid to the respondent to account of its taxed costs.

Appeal dismissed.

Reported by Brendan Navin Siva